

4-1-1987

## The Case for Animal Rights. By Tom Regen

Steven Zak

---

### Recommended Citation

Steven Zak, *The Case for Animal Rights. By Tom Regen*, 20 Loy. L.A. L. Rev. 1227 (1987).  
Available at: <https://digitalcommons.lmu.edu/llr/vol20/iss3/14>

This Book Review is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

## REVIEW/ESSAY

THE CASE FOR ANIMAL RIGHTS. By Tom Regan. Berkeley and Los Angeles: University of California Press, 1983.

*Steven Zak\**

### I. INTRODUCTION

Over the past two centuries, the animal protection movement has made great changes both in substance and style. Once content with, or resigned to, limiting its condemnation of animal exploitation to a few select areas,<sup>1</sup> the movement now attacks such abuse on every front. Once satisfied to be described by the dismissive term "animal lovers," advocates for nonhumans have become increasingly militant. The forerunner of today's animal activists, the Society for the Prevention of Cruelty to Animals (SPCA), founded in London in 1824,<sup>2</sup> and its American progeny have been overshadowed by more hard-line groups,<sup>3</sup> including some with names like Hunt Saboteurs Association<sup>4</sup> and the Animal Liberation Front.<sup>5</sup> Pleas for "mercy"<sup>6</sup> have given way to demands for rights, the significance of which is this: that the moral issue society and the legal system have for so long effectively ignored not only refuses to go away but is asserting itself more insistently than ever. Those who wish to understand it would do well

---

\* J.D., 1984, U.S.C.; free-lance writer specializing in animals and the law.

I would like to thank Michael S. Moore for his comments on this Article, and Edwin M. Smith for comments on a preliminary work. Thanks to David W. Carroll and Michael H. Shapiro for their helpful insights into animal rights problems and philosophy in general. Special thanks to Christopher D. Stone for encouraging me to undertake this project, and to Ronald R. Garet for forcing me to examine some difficult philosophical issues which I had been reluctant to acknowledge. Special thanks, also, to my wife Jacqueline for her editorial insights and moral support.

1. See, e.g., J. TURNER, RECKONING WITH THE BEAST 15 (1980) (efforts to prohibit bull-baiting in Victorian England); *id.* at 33 (early animal protectors directing their efforts almost exclusively toward farm animals).

2. *Id.* at 40. This organization was redesignated the Royal Society for the Prevention of Cruelty to Animals (RSPCA) by Queen Victoria in 1840. *Id.* at 44.

3. See Stevens, *Laboratory Animal Welfare*, in ANIMALS AND THEIR LEGAL RIGHTS 52-53 (1978) (American Society for the Prevention of Cruelty to Animals supplying dogs to research institutions and opposing pro-animal legislation). This is not necessarily the current policy of the American Society for the Prevention of Cruelty to Animals (ASPCA).

4. *Hunt Saboteurs Ruin Bloodsporting Day*, AGENDA, Sept.-Oct. 1983, at 17 (renamed ANIMALS' AGENDA).

5. *Animal Liberation Front: 'Deep Ecology'*, L.A. Times, Dec. 30, 1984, pt. I, at 1, col. 1.

6. See, e.g., H. PRIMATT, A DISSERTATION ON THE DUTY OF MERCY AND SIN OF CRUELTY TO BRUTE ANIMALS (London 1776).

to read Tom Regan's book, *The Case for Animal Rights*.<sup>7</sup>

Regan, a Professor of Philosophy at North Carolina State University, has authored and edited several other books on animal rights, and has written many articles on the subject in philosophy journals. The audience he hopes to reach with *The Case for Animal Rights* is comprised not only of his professional peers but of "those whose daily work brings them into direct contact with animals," as well as "all those who labor for the cause of the better treatment of animals."<sup>8</sup>

Not since Peter Singer's 1975 book *Animal Liberation*<sup>9</sup> has there been such a comprehensive treatment of the subject, though Regan has eliminated much of the Singer-type exposé in favor of developing a more thorough argument. Like Singer, Regan writes in a style that is a mix of formal philosophy and journalism; on occasion he makes arguments rather casually. If this causes impatience on the part of hardcore philosophers, the book's readability and broader accessibility more than compensates.

Regan has set out to "lay the philosophical foundations of the animal rights movement."<sup>10</sup> This is a tall order, and he only partially succeeds. He makes no pretenses about having solved every relevant issue, and no one could expect him to. But there are matters he might have considered that he did not, and there are times when his analysis lapses into imprecision. In the main, though, his argument is carefully drawn and powerful. It should provide inspiration, if not perfect guidance, to those with a vision of a better day for nonhumans.

## II. NONHUMANS AND THE LAW

To understand our own law's view of animals, one might look as far back as Aristotle, who thought that "in none but [man] is there intellect";<sup>11</sup> and that animals as "the lower sort are by nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master."<sup>12</sup>

In the thirteenth century, Saint Thomas Aquinas wrote that intellectual creatures hold the highest place in the universe "because they approach nearest to the divine likeness[<sup>13</sup>] . . . [They] are ruled by God, as though He cared for them for their own sake, while other creatures are ruled as being directed to rational creatures."<sup>14</sup> From this it was a short step to the conclusion that "it is no wrong for man to make use of [animals], either by killing or in any other way whatever."<sup>15</sup>

Inspired by the Scientific Revolution, René Descartes wrote that animals

---

7. T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983).

8. *Id.* at xi.

9. P. SINGER, *ANIMAL LIBERATION* (1975).

10. T. REGAN, *supra* note 7, at xi.

11. *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 55 (T. Regan & P. Singer eds. 1976).

12. *Id.* at 109.

13. *Id.* at 57.

14. *Id.* at 56.

15. *Id.* at 59.

are mechanistic—that lacking language, they must have no thoughts or souls and are mindless “machines.”<sup>16</sup> Seventeenth-century France was the birthplace of modern physiology,<sup>17</sup> and the extent to which early physiologists adopted Descartes’ mechanistic materialism is illustrated in this account of their work, written by an unsympathetic contemporary:

“There was hardly a *solitaire* who didn’t talk of automata . . . . They administered beatings to dogs with perfect indifference, and made fun of those who pitied the creatures as if they felt pain. They said the animals were clocks; that the cries they emitted when struck, were only the noise of a little spring that had been touched, but that the whole body was without feeling. They nailed poor animals up on boards by their four paws to vivisection and see the circulation of the blood which was a great subject of controversy.”<sup>18</sup>

In the common law, animals were seen as mere property, and cruelty to animals was punishable only if it was a public nuisance.<sup>19</sup> By the beginning of the nineteenth century, apparently influenced by the ideas of artists like Wordsworth<sup>20</sup> that men should find harmony with the rest of the natural world, people were ready for legislation protecting animals, and in 1828, the first anti-cruelty statute in the United States was enacted in New York.<sup>21</sup>

Now, every state has some version of an anti-cruelty statute, but these laws provide animals only minimal protection. First, even when they are enforced, their penalties are small compared to some of the crimes against animals.<sup>22</sup> Second, courts often interpret the *mens rea* requirement of these statutes as not only requiring intent, but a particularly sadistic motive.<sup>23</sup> In twenty-five states, stat-

16. R. DESCARTES, A DISCOURSE ON METHOD AND OTHER WORKS 113-16 (1965).

17. J. TURNER, *supra* note 1, at 84.

18. T. REGAN, ALL THAT DWELL THEREIN 5 (1982) (quoting L. ROSENFELD, FROM ANIMAL MACHINE TO BEAST MACHINE 27 (1968)).

19. Leavitt, *The Evolution of Anti-Cruelty Laws in the United States*, in ANIMALS AND THEIR LEGAL RIGHTS 12 (1978).

20. J. TURNER, *supra* note 1, at 31.

21. Leavitt, *supra* note 9, at 12.

22. See, e.g., CAL. PENAL CODE § 597(b) (West Supp. 1987) (while cruelty to an animal which is the “property” of another can be a felony, cruelty to other animals not endangered is a misdemeanor with maximum penalty of six months in jail and \$1000 fine); *Cruelty: Criminal Prosecutions/Convictions*, Animal Rts. L. Rep. (Soc’y for Animal Rts., Inc.), at 2 (July 1982) (man who dragged dog alongside his car at 30 m.p.h. fined \$965; and, in rare case in which jail sentence is imposed, man given 15 days in jail and \$200 fine for killing a stray cat in a microwave oven); *Priest Who Drowned Cats Gets Probation, Choice of Jail or Fine*, L.A. Times, May 20, 1982, pt. II, at 7, col. 5 (priest convicted of drowning 10 cats ordered to pay fine of \$300 or pay \$300 to a local animal foundation).

23. See, e.g., *State v. Fowler*, 22 N.C. App. 144, 146-47, 205 S.E.2d 749, 751 (1974) (conviction for cruelty of man and wife who tied up dog, hit it, kicked it, and held its head under water for up to 45 seconds repeatedly over 20 minute period overturned because the two were animal trainers and were training dog not to dig holes, though “[t]he same act committed against the dog for the purpose of torturing it would be within the purview of the statute”); see also *New Jersey Soc’y for the Prevention of Cruelty to Animals v. Board of Educ.*, 91 N.J.

utes are explicitly limited to acts that are done "willfully," "maliciously," or "cruelly."<sup>24</sup> The issue in cases under these laws is often the character of the actor, not the interests of his nonhuman victim.<sup>25</sup> Third, the coverage of these laws is limited. For instance, in twenty-one states anti-cruelty statutes explicitly exempt experimental animals from coverage; in other states experimental animals are in practice exempt.<sup>26</sup>

In 1966 Congress passed the Laboratory Animal Welfare Act,<sup>27</sup> the first federal law regulating the treatment of laboratory animals. Its stated purpose was to protect dog and cat owners from the theft of their pets by prescribing the use of stolen animals by laboratories, and it also called for the "humane care and treatment"<sup>28</sup> of lab animals. The Animal Welfare Act (AWA), passed in 1970, and amended in 1976, and 1985,<sup>29</sup> expanded the protection of the 1966 act to more animals and provided that animals should have certain basic comforts such as adequate housing, ample food and water, and the "appropriate"<sup>30</sup> use of pain-killing drugs. But "adequate" housing can mean a tiny cage,<sup>31</sup> lack of exercise, and social isolation. And this Act does not regulate the actual experiments;<sup>32</sup> researchers are free to withhold pain-killing drugs whenever they think that such drugs will interfere with their results—or when, as in the use of electric shock, pain is an integral part of the experiment.<sup>33</sup>

The 1985 amendments require institutional Animal Committees at all research institutions to oversee research protocols. The amendments call for improved enforcement of the AWA and for minimization of unintended duplication in experiments. For the first time, researchers using dogs must provide them

---

Super. 81, 91-94, 219 A.2d 200, 206-07 (1966), *aff'd*, 49 N.J. 15, 227 A.2d 506 (1967) (school board's power to permit students to perform painful experiments on animals upheld on the grounds that "[c]ruelty . . . is the unjustifiable infliction of pain, with the act having some malevolent or mischievous motive," whereas student in this case was "an outstanding student . . . strongly motivated toward a career in medical research."). Courts may take a different view when the victim is human. *Mercy Killers Conviction Upheld by Federal Court*, L.A. Times, May 1, 1986, pt. 1, at 18, Col. 1. (Murder conviction of 76-year-old man for mercy killing of terminally ill wife upheld because "[g]ood faith is not a defense for first-degree murder." One judge added, "my thoughts lie with the victim.").

24. Leavitt, *supra* note 19, at 15.

25. *See supra* note 23.

26. *See, e.g.*, Taub v. Maryland, 296 Md. 439, 463 A.2d 819 (1983) (conviction of the only researcher ever prosecuted for mistreatment of animals in lab overturned on grounds that state anti-cruelty law does not apply to federally funded researchers). In the words of a volunteer in Taub's lab, the failure to provide veterinary care for monkeys during experiments resulted in the animals "ripping off their own fingers and shredding their palms so that broken bones stuck out at the wrists."

27. Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966).

28. *Id.*

29. 7 U.S.C. §§ 2131-2157 (1982 & Supp. III 1985).

30. *Id.* at § 2143(a)(3)(A) (Supp. III 1985).

31. The Secretary of Agriculture is responsible for enforcing the AWA and promulgating standards which can be found beginning at 9 C.F.R. § 1.1 (1986).

32. 7 U.S.C. § 2143(a) (Supp. III 1985).

33. *See generally* SINGER, *supra* note 9.

with exercise, though this may involve no more than their "removal from the cage during cleaning."<sup>34</sup> The amendments also require physical environments adequate to provide for the psychological well-being of primates, though many animal rights activists believe that this is impossible since laboratories, geared for keeping animals in isolation would have to undergo enormous changes to provide for the complex social and psychological needs of primates. The United States Department of Agriculture has not yet published its revised regulations pursuant to the recent amendments, but is expected to do so by mid-1987.

The 1985 amendments did not occur in a political vacuum. In December of 1984 the Animal Liberation Front (ALF) broke into a lab at the City of Hope Hospital in Duarte, California, and liberated more than 100 dogs, cats, rabbits and mice. The group produced City of Hope records revealing "a history of animal mortality due to negligence, procedural error, and lack of post-operative care": dogs, unattended, bled to death, suffocated in their own fecal matter, or died of anesthesia overdoses or of "unknown" causes.<sup>35</sup> These revelations resulted in embarrassment to the National Institutes of Health (NIH), which funds a majority of the animal research in the United States; the NIH subsequently revised its own guidelines for care and use of laboratory animals and promised to be more vigilant in their enforcement.

Seven months before the City of Hope action, the ALF had raided a lab in a sub-basement at the University of Pennsylvania School of Medicine and removed thirty-four video tapes. These tapes showed researchers inducing brain damage in baboons by strapping the animals to a table and jerking their heads in a sixty-degree arc by means of a device called the Penn II head accelerating machine. In one sequence a researcher cuts into a monkey's head as the animal thrashes on the table. "Yeah, it hurts him, for Christ's sakes," another researcher says, as the cutting continues.<sup>36</sup> After much political maneuvering by animal activists and their opponents at the NIH, portions of these tapes were finally viewed by members of Congress in May of 1985.

Despite the 1985 amendments to the AWA and revision of NIH guidelines, in December of 1986 another animal liberation group, True Friends, broke into a lab at the SEMA corporation in Rockville, Maryland, and liberated four baby chimpanzees from a group of over thirty. These animals, who were being used in AIDS and hepatitis research, were being housed in isolation cages. True Friends also took documents revealing "hundreds of unplanned animal deaths" among SEMA's over 700 nonhuman primates. According to a 1986 press release, commonly occurring deaths were caused by "excessive bleeding" after a procedure, "failing to recover from anesthesia" and "starvation."<sup>37</sup> With the

---

34. 131 CONG. REC. S17943 (daily ed. Dec. 18, 1985) (statement of Sen. Dole).

35. Newsletter from People for the Ethical Treatment of Animals (PETA), *History of Unplanned Deaths—Autopsy Reports Summary* (undated) (P.O. Box 42516, Wash. D.C. 20015).

36. *University of Pennsylvania*—"Unnecessary Fuss," PETA News, Issue No. 4, at 13 (undated) (P.O. Box 42516, Wash. D.C. 20015).

37. Newsletter from PETA (undated) (P.O. Box 42516, Wash. D.C. 20015).

blessing of the AWA, each year in the United States some 70 million animals<sup>38</sup> are used in experiments like these:

—At the Armed Forces Radiobiology Research Institute in Bethesda, Maryland, monkeys were irradiated, resulting in diarrhea and vomiting up to fifty times each per hour, then forced to run on treadmills to avoid electric shock.<sup>39</sup>

—At the University of Arizona College of Medicine, dogs had their esophagi burned with lye, and were given no anesthetics for four weeks afterward.<sup>40</sup>

—At the National Aeronautics and Space Administration, monkeys were immobilized for ten weeks in a nylon straightjacket on an aluminum frame.<sup>41</sup>

—At Vanderbilt University, rats were starved, immobilized in a plastic restraining device, refrigerated for up to six hours, then electric shocked to determine the degree of ulceration that would result.<sup>42</sup>

—At the University of Rochester, monkeys were blinded by having their eyeballs removed, or by induced glaucoma or photocoagulation. Researchers reported that:

the blinding seemed to have the effect of "calming" these highly excitable wild animals . . . . It was common to discover the blind squirrel monkey during the day, unlike the intact animal, curled up in its home cage in the full posture of sleep, i.e., with its head between its knees, tail over its shoulders.<sup>43</sup>

Over three and a half billion animals per year are raised and slaughtered for food in the United States.<sup>44</sup> Although Congress passed the Humane Slaughter Act in 1958 which calls for "humane methods of slaughter,"<sup>45</sup> the Act applies only to slaughterhouses selling meat to the United States government, and exempts kosher-killed animals from its requirements.<sup>46</sup> Furthermore, the greater

38. A. ROWAN, *OF MICE, MODELS, & MEN* 67 (1984).

39. D. PRATT, *ALTERNATIVES TO PAIN IN EXPERIMENTS ON ANIMALS* 114 (1980).

40. *Id.* at 163-65.

41. *Id.* at 127.

42. *Id.* at 65.

43. *Id.* at 50-51. These are not isolated incidents. Even the conservative United States Department of Agriculture, which is responsible for enforcement of the Animal Welfare Act (AWA), reports in its publication, *Animal Welfare Enforcement*, that in fiscal year 1985, the number of lab animals experiencing pain or distress unrelieved by drugs was 147,412. This figure does not include members of species used in labs but not "protected" by the AWA, including mice, rats, birds, fish, amphibians, reptiles and farm animals. Nor does the figure account for incidental suffering like boredom, anxiety, frustration, general fear and unreported post-operative or other pain.

44. M.W. FOX, *FARM ANIMALS* 5, 41, 81 (1984) (figures for the slaughter of poultry, pigs and cattle).

45. THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, *First Federal Law to Prevent Cruelty to Animals*, in *ANIMALS AND THEIR LEGAL RIGHTS* 34 (1978).

46. *Id.* at 36. Kosher dietary laws require that the animal be conscious when it is killed, so it cannot be stunned before its throat is slit. In addition, health laws will not allow an animal

portion of a farm animal's life is spent not in the slaughterhouse, but on the "farm," which today often means an intensive, indoor "factory farm" where animals may be fed by automated machines and are packed in great numbers into the minimum space possible.<sup>47</sup> For instance, egg-laying birds, an average of 80,000<sup>48</sup> per building, are housed in cages stacked in tiers. As many as five birds will occupy a sixteen by eighteen inch cage.<sup>49</sup> Veal producers buy day-old calves and keep them for fourteen to sixteen weeks, each in a stall barely larger than his body, until they are ready for slaughter.<sup>50</sup> A commercially available confinement system for pigs, advertised as the "Bacon Bin," houses 500 pigs in seven square feet of living space each.<sup>51</sup> These intelligent animals sometimes react to the stress of confinement with "Porcine Stress Syndrome," whose symptoms include "rigidity, blotching skin, panting, anxiety, and often—sudden death."<sup>52</sup> Though the AWA authorizes the Secretary of Agriculture to prescribe certain housing standards for animals in the custody of research institutions, animal sellers and exhibitors, the Act exempts farm animals from its coverage.<sup>53</sup>

Another large area of exploitation of nonhumans is trapping. Over eighteen million fur-bearing animals are trapped each year in the United States, including the badger, bassarisk, bears, beaver, bobcat, coyote, cougar, fisher, arctic fox, gray fox, red fox, lynx, marten, mink (wild), muskrat, nutria, opossum, otter, raccoon, skunk, weasel, wolf, and wolverine. For every one of these "target" animals, as many as two "trash animals"—including swans, song birds, squirrels, porcupines, dogs, and anything else that stumbles into a trap—are caught, mostly in the notorious leg-hold trap,<sup>54</sup> a device with steel jaws that snap shut on the animal's leg when she steps on a trigger.<sup>55</sup> The animal can spend days and even weeks in violent struggle, and may gnaw off her own leg to escape.<sup>56</sup>

One variation, called a "pole trap,"<sup>57</sup> is mounted on a pole or tree stump; the animal falls with the trap and is left hanging by a paw.<sup>58</sup> Another version pulls the animal under water, where he can take as long as twenty minutes to

---

to fall in the blood of a previously slaughtered animal. The net result is that the animal must be hoisted in the air by a shackle around his rear leg while still conscious. He hangs upside down for several minutes before he is killed. Since the animal may weigh between 1000 and 2000 pounds, this often results in bones snapping, or skin opening and slipping away from the bone. P. SINGER, *supra* note 9, at 155.

47. See generally M.W. FOX, *supra* note 44; J. MASON & P. SINGER, *ANIMAL FACTORIES* (1980).

48. J. MASON & P. SINGER, *supra* note 47, at 3.

49. SINGER, *supra* note 9, at 104. See generally J. MASON & P. SINGER, *supra* note 47.

50. J. MASON & P. SINGER, *supra* note 47, at 13; see also M.W. FOX, *supra* note 44, at 95.

51. P. SINGER, *supra* note 9, at 115.

52. *Id.* at 114.

53. 7 U.S.C. § 2132(g) (1982).

54. Stevens, *From Fur Bearer to Fur Wearer: the Agony of the Transition*, in *FACTS ABOUT FURS* 87 (1980); see also C. AMORY, *MAN KIND?* 205 (1974).

55. C. AMORY, *supra* note 54, at 198; see also Stevens, *supra* note 54.

56. Stevens, *Trapping and Poisoning*, in *ANIMALS AND THEIR LEGAL RIGHTS* 160 (1978).

57. C. AMORY, *supra* note 54, at 199.

58. *Id.*



drown.<sup>59</sup> A different kind of trap, described by one author as possibly the only one more horrible than a leg-hold trap, is the snare<sup>60</sup>—a wire noose that pulls tighter and tighter as the animal struggles:

One last strong pull and he could relatively rapidly strangle himself, but by that time he's too weak to do this and the wire gradually, with his increasingly feeble efforts, sinks ever deeper into his neck. If, indeed, he is lucky enough to be caught by the neck and not in another area such as the shoulder, or stomach or anywhere else. Then his suffering can be literally beyond description.<sup>61</sup>

The law in this area is minimal. Only two states, Rhode Island and New Jersey, ban the leg-hold trap. Several states limit the use of the leg-hold trap, but do not ban its use entirely.<sup>62</sup> All but seventeen states allow the use of the snare.<sup>63</sup> In only twenty-two states, teeth on leg-hold traps are illegal. Two states have no restrictions whatever on the kinds of traps that may be used. Juveniles are exempt from licensing requirements in twenty-three states. Four states have no requirement that traps be checked periodically; the other states require visitations every 36, 48, or 72 hours, or once a week.<sup>64</sup> What little comfort that should bring to an animal caught in such a trap, the requirement as a practical matter is unenforceable.<sup>65</sup> And trappers are free to use their ingenuity in killing any animal they find in their traps.<sup>66</sup> Some half-dozen bills to restrict or ban the use of traps such as the leg-hold have been introduced in Congress from 1957 to the present,<sup>67</sup> but none has become law.<sup>68</sup>

These are not the only areas of nonhuman exploitation, but they are some

---

59. *Id.*

60. *Id.* at 214.

61. *Id.*

62. Nilsson, *Legislation Regulating the Taking of Furbearers*, in *FACTS ABOUT FURS* 149 (1980).

63. *Id.* at 152-55.

64. *Id.* at 150.

65. Stevens, *supra* note 3, at 159; see also C. AMORY, *supra* note 54, at 206.

66. See C. AMORY, *supra* note 54, at 215. A trapper describes how a "coon" in a trap put up a "very good fight" as the trapper tried to kill the animal with a club; outdoor-type magazine article recommends that to kill a fox in a trap one should stun him "with a trowel or handle of a belt axe," then "stand on him just back of the front legs several minutes, and by doing so you will not have blood in his fur." *Id.*

67. See, e.g., Stevens, *supra* note 3, at 159; see also *Trapping*, Animal Rts. L. Rep. (Int'l Soc'y for Animal Rts., Inc.), at 9 (Oct. 1983).

68. Countries banning the use of the leg-hold trap include Austria, Bangladesh, Belize, Brazil, British West Indies, Chile, Columbia, Costa Rica, Denmark, West Germany, Great Britain, Hong Kong, Hungary, India, Republic of Ireland, Israel, Jamaica, Jordon, Malawi, Malaysia, Mozambique, Niger, Norway, Portugal, Seychelles Islands, Singapore, Sweden, Switzerland, Trinidad and Tobago. See Nilsson, *supra* note 62, at 148-49. For a discussion of a related topic, hunting, and how fish and game agencies "manage" wildlife for the purpose of maximizing "game" animals for the benefit of hunters, see R. BAKER, *THE AMERICAN HUNTING MYTH* (1985); *Conservation Group Assails Spending Priority on Wildlife*, N.Y. Times, Nov. 13, 1986, at 15, col. 1.

of the most celebrated and aptly illustrate that what little protection the law affords nonhumans ends where their interests conflict with any human interest thought to be legitimate. "Legitimate" means almost anything beyond the most wanton, purposeless sadism; and there is room for argument as to whether even that is excluded.

### III. REGAN'S VIEW

#### A. *Synopsis of Regan's View*

Regan contends that we fail to see nonhumans as rights-holders because, a la Descartes, we misunderstand them. But nonhuman welfare, he argues, is no different in kind than human welfare. Nonhumans, like humans, are conscious. We know this, he says, not only through common sense, but because of their similarity to us, behaviorally and physiologically.<sup>69</sup> Indeed, early vivisectors discovered that humans and nonhumans are "in many cases identical, organ for organ," and early neurological studies suggested that sensation is similar among many species.<sup>70</sup> Knowledge of our evolutionary relationship with other species, Regan adds, provides a theoretical basis on which to ground this view: consciousness has adaptive value, and there is no reason to suppose that our species is the only one that has it.<sup>71</sup>

Not only are animals conscious, Regan says, but their consciousness is complex. He argues that many animals have beliefs, desires, intentionality, memory, and a sense of future and of self.<sup>72</sup> Particularly compelling is his analysis of nonhumans' ability to conceptualize. He argues that, based on their behavior and on the previously noted similarities between them and us, we can find access to the content of some of their concepts. And that humans and nonhumans share some concepts in common.<sup>73</sup>

Regan discusses various non-rights-based ethical theories and argues that they are inadequate to account for our duties toward animals. Indirect-duty views, such as those of Kant, in which the duty toward nonhumans is not thought to be for their own sake, arbitrarily exclude them and other moral patients from direct moral consideration since patients can be harmed in some of the same ways as agents.<sup>74</sup> Regan considers two direct-duty views—the "kindness view" and act utilitarianism—and argues that the former fails to capture the obligation we have to animals;<sup>75</sup> while the latter "fails to provide an ade-

---

69. T. REGAN, *supra* note 7, at 28-29.

70. J. TURNER, *supra* note 1, at 4.

71. T. REGAN, *supra* note 7, at 18-19. See generally D. GRIFFIN, *ANIMAL THINKING* (1984); D. GRIFFIN, *THE QUESTION OF ANIMAL AWARENESS* (1981); S. WALKER, *ANIMAL THOUGHT* (1983).

72. T. REGAN, *supra* note 7, at 73-78.

73. *Id.* at 49-60.

74. *Id.* at 185-93.

75. *Id.* at 198-200.

quate basis for the stringency of the prima facie direct duty not to harm,"<sup>76</sup> since it could allow such acts as secret killings of either agents or patients to bring about a maximization of pleasure/pain or preference satisfaction.<sup>77</sup>

Regan argues that perfectionist theories of justice, such as that of Aristotle, according to which "what individuals are due . . . depends on the degree to which they possess a certain cluster of virtues or excellences" could provide a foundation for slavery or other inequalitarian systems.<sup>78</sup> Utilitarian theories of justice, such as Singer's, are also inadequate because, he says, they treat individuals as mere "receptacles" of value,<sup>79</sup> as if they were worthless cups and happiness or satisfied preferences were the valuable liquid they contain. This is a metaphor that Regan uses repeatedly throughout the book.

As an alternative to these theories, Regan proposes the idea of inherent value,<sup>80</sup> which (1) is not earned by efforts, (2) does not wax or wane according to the dictates of utility, and (3) is independent of one's being the object of the interest of others.<sup>81</sup> Inherent value must be posited to be equal, he says, to avoid perfectionism;<sup>82</sup> and it cannot be unarbitrarily restricted to agents.<sup>83</sup>

Regan then attempts to discover what characteristics an entity might have that would give rise to inherent value. If all humans have inherent value, then any characteristic that some humans lack, he says, cannot be necessary for inherent value<sup>84</sup>—using language, for instance. Merely being alive, though, is insufficient, or potatoes and cancer cells would have inherent value.<sup>85</sup> Regan proposes as a sufficient condition for having inherent value being the "subject-of-a-life"—having beliefs and desires, perception, memory, a sense of future and self, an emotional life including feelings of pleasure and pain, the ability to initiate action, a psychophysical identity over time, interests and welfare.<sup>86</sup> He argues that at the minimum, all mammalian animals aged one year or more can reasonably be thought to have these characteristics, based on the previously noted similarities they have with humans.

The rights view, then, is this: All subjects-of-a-life, without regard to voluntary acts or institutional arrangements, must have their inherent value respected. They must be treated not as mere receptacles of value (containers for happiness or preferences), but as valuable in themselves; they cannot be harmed "on the grounds that the aggregate consequences for all those other 'receptacles'

---

76. *Id.* at 228.

77. *Id.* at 202-08.

78. *Id.* at 233-34.

79. *Id.* at 238.

80. *Id.* at 235.

81. *Id.* at 237.

82. *Id.* at 234.

83. *Id.* at 239-41.

84. *Id.* at 241.

85. *Id.* at 242.

86. *Id.* at 243.

affected by the outcome would be 'the best.' ”<sup>87</sup>

### B. Critique of Regan

Regan, at times, expends considerable effort attacking what appear to be weak ideas. For instance, he devotes a full chapter to challenging the Cartesian view of nonhumans as mechanistic, which may strike some readers as an instance of flogging a straw man; many would quickly concede that animals are conscious, and want to get on to issues of greater controversy. But much of what the law permits in the treatment of nonhumans would be hard to explain without positing that it has absorbed this mechanistic view and remains influenced by it. So, in this instance, it is worthwhile to bring a now rarely-articulated view into the open and dispatch it once and for all. This Regan does, systematically and thoroughly.

His attacks on utilitarianism, though, are not quite as satisfying. He argues convincingly that utilitarianism could allow acts and policies that our intuitions say are wrong, and that rights must be postulated as a safeguard against those acts and policies. But he never considers the possibility that utilitarianism, while insufficient when taken in isolation, might have some validity as part of a larger theory. What utilitarianism seeks to maximize has not, after all, been chosen at random. It seeks to maximize happiness or preferences, not, say, the number of grains of sand in the universe; and happiness or preference maximization presumably is good for individuals. Utilitarianism, then, could be thought of not as a value system that respects general welfare instead of individuals, but rather as a *method* of respecting individuals indirectly by protecting them en masse. If there are times when this method is well-suited and other times when looking to the interests of individuals directly is appropriate, then the interplay between the two approaches—particularly with regard to our treatment of nonhumans—might be a subject for further exploration.

One opportunity Regan missed to explore this interplay is in the area of species conservation. Regan correctly points out that environmentalists who want to preserve species but who think that individual animals do not matter are wrongly and arbitrarily excluding those individuals from direct moral consideration. He argues, again correctly, that this “wildlife management” attitude is often self-serving, not other-respecting, as when wildlife management agencies set limits on hunting in any given season in order to assure that there will be plenty of animals around for their hunting constituency to kill in future seasons.<sup>88</sup> But those who do respect individual animals may find that, in some instances, efforts to protect them would be more efficaciously applied toward species or ecosystems.<sup>89</sup> Perhaps emphasis on individuals may be appropriate, most often, when the issue is negative, defensive rights: the right not to be

---

87. *Id.* at 328.

88. *Id.* at 355.

89. *Cf.* Smith, Book Review, 55 S. CAL. L. REV. 772 (1982) (analogously, Smith points out that to prevent the vanishing of species we must also preserve ecosystems).

harmed or used as a mere means to benefit others; while utilitarianism, suitably constrained by rights, may have some applicability where affirmative measures are being considered to prevent naturally-occurring harm to nonhumans. It may be, for instance, that only when the lives of many nonhumans are at stake do we have an *affirmative* duty to take extreme (that is, expensive or dangerous) measures to save them from floods, pestilence or famine. Note, though, that if some humans are violating nonhuman rights, these nonhumans may have a right to our affirmative aid, even if that aid is costly. This is because the idea of rights may have built into it not only the duty not to violate rights but also the duty not to allow others to violate rights. It may also be that such affirmative measures on a preventative, ongoing basis (as opposed to in response to a crisis) are more appropriately applied to whole ecosystems than to individual beings.<sup>90</sup>

Rights-talk tends to emphasize our negative duties, which is where most of Regan's concern lies: the duty *not* to torture and kill animals in labs, to *not* slaughter or hunt them. In fact, as will be discussed later, Regan is suspicious of human meddling with nonhuman affairs or with nature, and so is more than willing to forego advocating sweeping affirmative duties toward nonhumans (except, again, where the affirmative duty is to prevent other humans from violating nonhuman rights). Utilitarianism may operate to activate our affirmative duties, since the duty to act so as to bring about some optimal state of affairs could just as well be affirmative as negative. Some hypothetical utilitarian animal advocate<sup>91</sup> might be concerned about animals in nature suffering from starvation, or from parasites or diseases that they have no way of ameliorating. Such a person may think that we ought to act affirmatively to alleviate such problems. While Regan's criticisms of utilitarianism in general and Singer in particular are clearly valid, these criticisms might have been more fruitful had Regan not attempted a wholesale dismissal of utilitarianism.

Regan has a more serious problem in his treatment of nonhuman awareness. He argues persuasively that many animals—at least mammals aged one year or more—have certain mental faculties such as beliefs, desires, intentionality, memory, and a sense of future and of self. But he does not explore the necessity of any or all of those components for the holding of rights. In fairness to Regan, he is not claiming that all of these faculties are necessary for rights holding, but only that many animals do have them and so are qualified—if not overqualified—for bearing rights. Even so, some exploration is in order.

This is particularly so since Regan indicates his belief that some animals may not have all of these faculties—frogs, perhaps, or other nonmammals whose physiological or behavioral similarity to humans may be insufficient to give rise

---

90. Though rights and holism are not in logical opposition, one should not be dismissive of Regan's fear that holistic thinking often does tend to lose sight of individuals. For a personal account of a champion of "biotic rights" who confesses to "unspeakable delight" in killing individual animals, see A. LEOPOLD, *A SAND COUNTY ALMANAC* (1968).

91. Singer does not seem to fit the profile of this hypothetical utilitarian. For his own account of why he embraces utilitarianism and rejects rights, see P. Singer, *Ten Years of Animal Liberation*, *The New York Review of Books*, 46, 48-50 (Jan. 17, 1985).

to the inference that these creatures share with humans certain mental attributes. Some animals, he says, may be conscious without being self-conscious.<sup>92</sup> And, he says, it may be that some animals—

which, though conscious and sentient (i.e., capable of experiencing pleasure and pain), lack the ability to remember, to act purposively, or to have desires or form beliefs—can only properly be viewed as receptacles of what has intrinsic value, lacking any value in their own right.

One should avoid being doctrinaire on this point.<sup>93</sup>

Regan claims that this issue is “well beyond the scope of the present work.”<sup>94</sup> But one wonders why he finds the matter so unconvincing.

Suppose that a nonhuman were capable of feeling what you would feel if someone pulled out your teeth, one by one, with a pair of needle-nose pliers. If that nonhuman were incapable, say, of forming beliefs, why would it follow that he lacked a right not to be caused such pain? If he could feel pleasure comparable to what you might feel in watching a funny movie and going out for a stroll in the park, but were incapable of acting purposively, why would his life have no value? In the latter case, what if the animal were a human—a child, say, paralyzed and unable to act purposively; and with a disease that will prove fatal in three days, and so without much in the way of a “life over time.”<sup>95</sup> Suppose this child is to be wheeled to the park, a baseball game, and the beach in the last days of his life, all of which he enjoys immensely. If someone kills him, has that person not deprived him of something worthwhile? Regan gives up too much in playing safe and deferring on these questions; he should be closing the door to overly-stringent requirements for rights holding.

Later, Regan does consider what it means to have welfare or to be harmed. Commendably, he begins to explore what he did not earlier. But still he does not go far enough in his exploration, and the questions he previously declined to face come back to haunt him here.

In a discussion of interests, Regan says that animals have them because, not only do they have basic needs like plants<sup>96</sup> (and corresponding “welfare interests”),<sup>97</sup> but unlike plants they desire to have those needs satisfied (they have “preference interests”).<sup>98</sup> As before, we are left to wonder: Is *desire* the necessary element for having interests? Or is it enough that one has a subjective life, a psychological makeup?

For example, Regan says that it may sometimes be acceptable to euthanize animals when they are in great pain that is expected to continue for as long as they live. “Animals in such conditions,” he says, “not only will be aware of

---

92. T. REGAN, *supra* note 7, at 208.

93. *Id.* at 246.

94. *Id.*

95. *Id.* at 121.

96. *Id.* at 89.

97. *Id.* at 87.

98. *Id.* at 89.

their pain at present, they will also desire to be rid of their pain as soon as possible . . . ”<sup>99</sup> In such a case, he says, we are not imposing our will on them when we kill them but are merely respecting theirs.

Is it helpful to talk in terms of *desiring* to be rid of pain? Does desiring to be rid of pain really mean anything more than *being* in pain? One could be in agony without being aware that there is a possibility of not feeling that way. People who suffer from chronic pain may become resigned to it, and may even think that pain is a normal state and that everyone feels that way. If one day their pain is alleviated, they may express amazement that this new feeling, sans pain, is even possible—they never knew that such a pleasant state existed! They never desired to be rid of their pain, but it was pain nonetheless. It seems better, then, to say that pain is just intrinsically bad, because it feels bad, than to say that it is bad because one necessarily desires to be rid of it.

More precisely, pain is bad (intrinsically) because it is not in accord with psychological needs. “Well-being” implies the fulfillment of psychological needs; one is well-off not because one desires to have these needs met, but because they *are* needs. Pursuing what you desire or prefer—at least in a general way—is itself a need; it is a mode of psychological functioning. So, not only is Regan’s focus on desire misplaced, but the welfare/preference distinction is impossible to maintain.

A discussion of interests leads naturally into an inquiry about harm, and Regan identifies two types: inflictions and deprivations. Inflictions consist of suffering, while deprivations are losses of opportunity for “attaining the kind of good life within [one’s] capacities.”<sup>100</sup> As to the former, he says that suffering is more than pain; the pain must be “severe enough and prolonged enough” to count as harm.<sup>101</sup> Paradigm cases of suffering, he says, “include severe burns, amputations, starvation, paralysis, such diseases as intestinal cancers and emphysema, brutal [did he really use *that* word?] torture,”<sup>102</sup> and several others. This list is unpleasant enough, but not very illuminating. Is he saying that some physical pain is not accompanied by any distress and therefore does not count as suffering? Apparently not or he could have just said as much and would have had no need for a list of paradigm cases of suffering. We are left to wonder exactly what the qualitative difference is between harm and mere hurt.

Regan gives us a clue when he says that suffering can “take the bottom out of people’s lives.”<sup>103</sup> What he seems to be getting at is the distinction between relatively trivial inflictions and those that destroy one’s functioning—particularly one’s mental functioning. If the rights-view is about respecting a subject’s need to function within the parameters of his nature, to *be* in accordance with the nature of his being, then Regan is making a powerful statement. And this

---

99. *Id.* at 113.

100. *Id.* at 88.

101. *Id.* at 95.

102. *Id.* at 94.

103. *Id.* at 95.

does seem to be what he is saying. "An animal's welfare," he says, "like a human being's, refers to the general tenor, the dominant quality of ongoing life as lived and experienced . . . ." <sup>104</sup> When he talks of want satisfaction, he is careful to distinguish between the satisfaction of isolated wants and the "harmonious satisfaction" of wants "not just today but generally." <sup>105</sup> He is clearly alluding to ongoing psychological functioning, but one wishes he would do so more directly.

Furthermore, the harm/hurt distinction is illusory, except in the most trivial sense, in which the point is that some harms are so minor as not to be too bothersome. Suppose two people, *A* and *B*, are both tortured. *A*, who is fifty years old, is only tortured for ten seconds; but the experience is so traumatizing for him that for the remaining fifty years of his life his mental functioning is severely impaired—he has nightmares, is afraid to go outside, and has continuous severe anxiety. The bottom, in other words, has been taken out of his life. *B*, on the other hand, is tortured from the day he is born until he is fifty, but recovers completely from this experience with no ill effects and lives another fifty years. The bottom has not been taken out of his life, but for those first fifty years he suffered as much as *A* did for his last fifty. Is there any sense in the idea that *A* was harmed while *B* was merely hurt? Suppose *A* is tortured not when he is fifty but when he is ninety-nine. The bottom falls out of his life for his remaining year. How could it be that he is harmed but *B* is not?

Though the harm/hurt distinction is unhelpful, Regan's implicit point remains valid—that humans and many nonhumans share something profound in common: they are not only objects, but subjects; they function not only physically like a can-opener or even biologically like a tree, but psychologically. That which damages a subject—particularly when it damages mental functioning or threatens psychological needs—is what we all understand as harm.

Regan's thinking becomes confused at a point in the book that begins with the following hypothetical: Suppose, he says, that fifty miners are stuck in a shaft, while a lone miner is stuck in a parallel shaft. The only way to save the fifty is to create an escape route by blowing up the shaft containing the one—and vice versa. If we do nothing, they will all die. What do we do? <sup>106</sup>

Regan's intuition is that we should save the fifty. His problem is that he needs to give some justification, other than utilitarianism—which he has rejected—for doing so. Ordinarily, to kill one for the benefit of others is to treat the one as if he had no inherent value, but rather had value only insofar as he could benefit others.

Regan introduces what he calls the "miniride" principle <sup>107</sup> which is this: When you must override rights, override the minimum number possible. So, he reasons, since we must override the rights of the fifty or of the one, the miniride

---

104. *Id.* at 89.

105. *Id.*

106. *Id.* at 298.

107. *Id.* at 301-02.



principle dictates that we override the one. He argues that the miniride principle is derived from the idea of respect for inherent value in the following way: If we flipped a coin, the odds would be stacked unfairly in favor of the lone miner, which would be to give him more than equal respect. So the best way to give all the miners equal respect is to save the greater number.<sup>108</sup>

Confusion is rampant here. First of all, Regan's arithmetic is off. The fact is that if we flipped a coin, each miner would have an equal chance of being saved; the odds are not stacked in favor of the lone miner. Each of the fifty would know that "heads he lives, tails he dies;" the lone miner would know that "tails he lives, heads he dies." So it is questionable whether the miniride principle really is derived from the principle of respect for inherent value.

But the problem goes further. Regan has not identified what rights he is talking about, so it is not clear that there are any rights being overridden here. Is he talking about each miner's right *not* to be killed for the greater welfare of others (a negative right), or the right *to* be saved (an affirmative right)? He may be thinking in terms of the negative right. But would Regan allow the lone miner to be killed to save the fifty if that miner were not trapped—if he were free to climb out but simply could not be contacted in time to get the others out before they ran out of air? What if the lone miner were not in the mine at all but in a bar around the corner, and the rescue team needed to drop someone into the mine to set off a charge. Could they carry him out of the bar, kicking and screaming, and drop him down the shaft? In the latter case, at least, Regan must say no, since that would be a paradigm instance of utilitarianism gone wrong.

How does that case differ from Regan's hypothetical? It differs in that we could, in that case, reasonably do nothing. Sorry as we might be, there would be no way to save the fifty without violating someone's right not to be killed. In Regan's hypothetical, on the other hand, if we do nothing all fifty-one are dead. True, if we blow up the lone miner's shaft, that miner might die a few hours sooner than he otherwise would have. But his life stuck in the shaft is not much of a life, and he may even be so frightened that a quick death two hours sooner would be a merciful alternative. So it is as if we were not really killing anyone, but rather were saving as many as we could. We are in the lifeboat and the miners are in the water. We are just pulling as many aboard as we can fit. Regan must be talking about the lone miner's right to be saved.

But assuming that it is reasonable to save as many as you can, and we just could not pull that last man aboard, it seems odd to say that his right was overridden. The same would be true if it is more reasonable to flip a coin than to choose the fifty outright; the loser of the toss does not have a right overridden. If there is an epidemic and you have enough medicine to save three people, and as you walk the streets you save the first three you find—or, you draw names out of a hat and save those three—it is strange to say that you have violated, or

---

108. *Id.* at 300-01.

overridden, the rights of all of the rest of the people you were unable to save. You did not use them as resources to save others; you simply saved as many as you could and were unable to save more.

Affirmative rights are more dependent on circumstances than are negative rights, particularly *the* negative right: the right not to have your functioning severely or totally impaired. One could make a stronger case, for instance, that no one ought ever to take my liver against my will to save someone else, than for the proposition that if my liver ever fails I have an absolute right to be provided with a new one regardless of whether there are enough available livers to go around. Negative rights are paradigmatic because to cause someone severe harm in order to benefit others is as if to expel him from the community of the morally considerable. One perceives such expulsion in far narrower circumstances with regard to the withholding of needed aid.

So the miniride principle has several problems. First, it is not clear at all how the principle follows from the idea of respecting inherent value. Second, if all the principle says is that when you cannot save everybody, save as many as you can, it does not seem very profound. And third, it is not clear what this principle is supposed to say about nonhuman rights.

Possibly, though, there *is* some principle derivable from the idea of inherent value that would allow us to save the fifty miners. If each miner has only a one in fifty-one chance of being the lone miner on any given day, then a rule that tells us to save the fifty would be in everyone's favor. Such a rule would increase each miner's chance of being saved on cave-in day, since each would always have a greater chance of being in the larger group. And such a rule, under these conditions, is egalitarian, respecting all equally.

But the circumstances under which this rule would fairly operate might be more narrow than is at first apparent. What if all the miners do *not* have an equal chance of being the lone miner? Suppose blacks tend to have some particular talent—whether naturally or socially acquired—that makes them better suited to the job that the lone miner must do; so the lone miner is always black, while the fifty are always white. During cave-ins, should we always sacrifice the black miner? What if the black miner is alone because the fifty whites put him in that position? What if the above-ground community—all white or otherwise—put the black in the lone position; should they still sacrifice him on cave-in day? And suppose that the cave-in is not naturally occurring, but is caused by the negligence of the fifty—or even by the negligence of the above-ground community?

Perhaps where the lone miner's plight was caused by the other miners, we should save the lone miner. And perhaps where the lone miner has been treated unequally by us (the above-ground community), we should flip a coin. While that might not produce the best consequences, at least it treats all miners equally. In any case, it is clear that the problem is more complicated than it first appeared.

Regan goes on to say that the miniride principle applies only when the

magnitude of the harms are comparable. He poses another hypothetical: You are again in an emergency situation in which one choice will result in harm to *A*, another choice will result in harm to a thousand, and doing nothing will result in both of those harms. But in this case, *A* will be harmed "minus 125," while each of the thousand will be harmed "minus 1." Regan reiterates his rejection of the utilitarian "minimize harm" principle, and introduces a new principle, the "worse-off" principle:

[W]hen we must decide to override the rights of the many or the rights of the few who are innocent, and when the harm faced by the few would make them worse-off than any of the many would be if any other option were chosen, then we ought to override the rights of the many.<sup>109</sup>

In Regan's hypothetical, then, we should choose to harm the thousand, since the one stands to be harmed more than any of them. In *this* case, application of the worse-off principle seems satisfactory, because it is in keeping with the idea of protecting a subject's ability to function. The trivial harm caused the thousand will not affect their functioning, while the enormous (we can assume that "minus 125" is enormous) harm to the other individual may destroy or severely impair his functioning. Some questions, however, are left unresolved: What if the harm to *A* is "minus 125," and the harm to the thousand is "minus 124" each? That would be closer to the case of the fifty-one miners. And what if every time there is an "emergency," the same group is always in the "not worse-off" category and so is always the one to suffer the harm? (And the "not worse-off" group never gets to decide who would or would not be worse off?)

From the worse-off principle, however, Regan moves into his most problematic area, which begins with another hypothetical: Suppose there are five survivors on a lifeboat—four normal adult human beings, and a dog. The boat will support only four. If no one is thrown over, the boat will sink and all will perish. Who should be thrown over?

Regan is confident: "The rights view's answer is: the dog. The magnitude of the harm that death is, it has been argued, is a function of the number and variety of opportunities for satisfaction it forecloses for a given individual . . . ."<sup>110</sup> Regan reasons that "[d]eath for the dog, in short, though a harm, is not comparable to the harm that death would be for any of the humans."<sup>111</sup> He concludes that "[t]he survivors would be acting within their rights . . . if they chose to kill . . . the dog in these dire circumstances."<sup>112</sup>

That Regan is so sure the dog's life is a less important interest to the dog than the human's life is to the human is baffling. First, it contradicts what he has maintained all along, that "[t]he equality or inequality of the interests of two individuals, *A* and *B*, depends on how important their respective interests are to

---

109. *Id.* at 308.

110. *Id.* at 351.

111. *Id.* at 324.

112. *Id.* at 351.

them . . . .”<sup>113</sup> Is not the dog’s interest in remaining alive as important to the dog as a human’s similar interest is to him? Imagine a dog and a human each caught in a leg-hold trap from which there is no escape. One can envision them howling and struggling equally—not only because their pain would be equal, but because they would be equally determined to stay alive. Of course, their equal interests do not depend on their having equal determination to maintain those interests; this just serves to illustrate the equal role that “staying alive” plays in the functioning—including the mental functioning—of human and nonhuman.

Suppose the dog and the human are equally happy, equally “harmonious” in their functioning. Even assuming, as Regan does, that a human is a “more complicated”<sup>114</sup> organism than a dog, what has complexity of functioning got to do with the worth, from one’s own viewpoint, of one’s life? Regan’s error is in thinking that if depriving an individual of opportunities for satisfaction is harm, then the more such opportunities one has, the greater the harm that death is. The former is harm because it threatens one’s harmonious functioning. Death, to both human and dog, destroys that functioning. Harmonious functioning must itself be presumed to be satisfying, if life is thought to be a good thing, even if one’s satisfaction is found in things not quite so elevated as philosophy. Chances are that the dog is happy—as are most dogs, given half a chance—and at least one human in the lifeboat is a miserable, scowling wretch. Regan made his decision regarding the fifty-one miners without inquiry as to which of *them* had the greater number of “opportunities for satisfaction” (the lone miner, by night, could have been a budding concert violinist while the fifty others might have been beer-swilling dolts); why is he suddenly willing to engage in quality-of-life comparisons when a dog is involved?

Regan does make a good point about lifeboat cases when he says that what can be done in exceptional cases “cannot be fairly generalized to apply to unexceptional cases.”<sup>115</sup> Change the lifeboat hypothetical slightly so that now there is a shortage of food, not space. If one could justifiably kill and eat the dog, Regan says, it would not follow that one could justifiably kill animals and eat meat as a general practice. This is intuitively plausible. In a *real* lifeboat case, one could conceive of a court excusing passengers for the killing and eating of one of their boatmates out of necessity, without condoning the general practice of cannibalism. But some discussion of this phenomenon is in order.

As mentioned earlier, some “necessity” cases differ from ordinary circumstances because if no choice is made, *all* will perish. Who should be saved remains an open question, but it seems reasonable to say that it is better if some are saved rather than none. But let us take a different case. Suppose the dog in the lifeboat is fat enough to survive without food until a rescue party shows up, while the people will die without killing the dog. Better yet, suppose there is no dog. There are five people, four strong but lean, and one weak but flabby. The

---

113. *Id.* at 213 (emphasis in original).

114. *Id.* at 89.

115. *Id.* at 352.

flabby one could survive until help arrives, but the others would not make it—so they overpower, kill and eat him.

One *might* imagine excusing them for killing to survive. But that would be different than justifying their actions. To benefit themselves, they killed a man who would have lived—clearly wrong, even if excusable, under Regan's theory of respecting inherent value. Necessity can never justify such a wrong.<sup>116</sup>

Imagine, for instance, that the only way to test a particular chemical weapon, and thus maintain parity with the Russians, is to secretly test it on some innocent person, thereby causing him great mental torment. We *might* do it. There have, in fact, been news reports of the United States Army and the CIA giving LSD to unsuspecting parties, in one case resulting in psychosis and ultimately in suicide.<sup>117</sup> But such acts are wrong. One might respond: Of course they are wrong; there is no necessity. But this misses the point. "Necessity" can never justify evil.

Imagine a case in which there really is a necessity, a case in which both acting and not acting have terrible consequences. Suppose Russian spies have hypnotized an innocent American whom they chose at random. They have revealed to his unconscious mind the whereabouts of a chemical bomb that, when it self-detonates, will cause a slow and excruciating death for the entire population of one state in the United States. This innocent person, who lives in another state, has been programmed not to reveal the information under any circumstances; and only the most extreme torture can overcome the effects of the hypnosis and make him talk. The government learns the identity of the person who has this information.

Though in ordinary circumstances we might—guided by the rights view—allow harm to come to the many rather than cause great harm to the one on their behalf, in this case the harm to the many is so extreme that it may seem wrong to do nothing and let it happen. But to torture that innocent person is a paradigm wrong. Now we are really in a lifeboat. And now we see the horror of being in a lifeboat. We cannot just say, smugly: "Torture the innocent one. We are within our rights." We cannot dismiss a terrible wrong so casually. Maybe we *will* torture the individual. But if we do, we are not satisfied at having done so; we are appalled. We vow to never again find ourselves in a lifeboat. We are outside the bounds of morality, and as moral agents we want to come back in. That is why an act we might do in a single, extreme case cannot justifiably be done as a general practice: It was not justifiably done even as an individual act.

---

116. See *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884) (two men afloat on small boat with almost no food kill a third person and live on his body, convicted of murder); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (crewman on overcrowded lifeboat who threw fourteen passengers overboard convicted of manslaughter).

117. See, e.g., *Another LSD Victim?* NEWSWEEK, Aug. 25, 1975, at 24 (U.S. Army experiments on psychiatric patient triggering heart failure); *The Casualty*, NEWSWEEK, July 21, 1975, at 17 (CIA slips LSD in unsuspecting man's drink to study uses of LSD in war and for intelligence gathering resulting in the man's suicide).

It might be fruitful, though, to pursue the question of why Regan wants to throw the dog overboard. He seems to be trying to account for his intuition that there is some difference in our relationship toward other members of our society—or toward other people generally, if modern humanity is becoming so inter-related as to become almost a single society—than toward, say, a beaver. Perhaps we can account for this difference without recourse to ideas such as that death to a beaver is less harm than death to a human.

Consider a question that Regan imagines his antagonists posing: If animals have rights, and if rights include the right to be protected against violators of those rights, do we have a duty to assist sheep against the attacks of wolves? (We can assume for this purpose that the sheep, like the wolves, are wild.) The wolf, Regan says, is not a moral agent; so the sheep have no rights against him. Since no rights are being violated, we have no duty to assist the sheep, and the paradox fails to materialize.<sup>118</sup>

But how does this jibe with Regan's view that "[i]f rabid foxes have bitten some children and are known to be in the neighboring woods, and if the circumstances of their lives assure future attacks if nothing is done, then the rights theory sanctions nullifying the threat posed by these animals"?<sup>119</sup> The fox is a moral patient and therefore is not violating the rights of the children. If we have a duty to assist these children, then why not the sheep?

Regan touches on a possible answer when he says that "[w]ith regard to wild animals, the general policy recommended by the rights view is: *let them be!*"<sup>120</sup> At one point he refers to these animals as "other nations," and indicates that we should allow them "to carve out their own destiny."<sup>121</sup> The "other nations" metaphor, which Regan borrowed from an oft-quoted essay by Henry Beston,<sup>122</sup> is a good one, but he should have explored it more fully. The metaphor seems to convey the following intuitions:

1. That we lack the expertise—not to mention the standards—to decide what is best for autonomous nonhuman groups. These groups have their own social arrangements and relationships with one another, and like foreign cultures, are alien to us.
2. As a corollary: We seem to do more damage than good when we meddle with the rest of the natural world.
3. We cannot trust ourselves to be altruistic; our seemingly best-intentioned motives may be self-serving.<sup>123</sup> So autonomous nonhuman groups are better off, generally, if we leave them alone.
4. Interfering with the cultures of nonhuman groups violates an ideal we

---

118. T. REGAN, *supra* note 7, at 284-85.

119. *Id.* at 353.

120. *Id.* at 361 (emphasis in original).

121. *Id.* at 357.

122. H. BESTON, *THE OUTERMOST HOUSE* (1956).

123. See Rodman, *Animal Justice: The Counter-revolution in Natural Right and Law*, 22 INQUIRY 3 (1979).

have both of them and of us. Maybe they should be autonomous because there is something pitiful about a domesticated wolf. Or maybe interfering with them seems arrogant and disrespectful, which is not how we ought to be.

Of course, the metaphor only takes us so far. Some animals, like dogs, may seem more like citizens than like aliens; while others—bats, perhaps—may seem totally alien. Still others, oddly, may fall somewhere in between. Might it be reasonable to say, for instance, that a pack of wolves living in Minnesota, and with their own separate culture and existence, are—like the Amish or certain American Indian tribes—simultaneously sovereign and members of our society?<sup>124</sup>

Many questions remain: To the extent that particular animals *are* like “other nations,” are there times when we can correctly act paternalistically towards them? When might we *owe* them a duty of affirmative aid? When we define a nonhuman group as alien, how do we know that we are doing so out of deference and not self-interested separation of “them” from “us”? However we answer these and other questions, some rights, as Regan has shown, are independent of group membership. The paradigm of such rights might be the right not to be used and harmed—the right not to be expelled from the moral community.

#### IV. CONCLUSION

Regan has undertaken an ambitious project in trying to build a philosophy for the animal rights movement. If some of the bricks in his foundation may be faulty, they can be repaired or replaced. His house remains standing, and through its windows shines this light: That there are certain things that ought not be done to a subject, because subjects must not be treated as if they were mere objects; that no subject ought to be denied respect because of membership in a foreign species; and that rights-talk is the best means to convey these ideas. Regan offers this consequent directive: “To recognize the rights of animals is to recognize the related duty to defend them against those who violate their rights . . . [and] to work to bring the *force of law* . . . to effect the necessary changes.”<sup>125</sup>

---

124. See, e.g., Naess, *Self-realization in Mixed Communities of Humans, Bears, Sheep, and Wolves*, 22 INQUIRY 231 (1979); see also *Elsie the Elk Is Slain Among the Friends She Trusted*, L.A. Times, Nov. 20, 1985, pt.1, at 2, col. 3 (members of a small town in Washington, angered when a hunter shot a tame elk they considered part of their community, condemn the killing as “cold-blooded murder”).

125. T. REGAN, *supra* note 7, at 353.